



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

Civil Action No. 19-C-9000

THIS DOCUMENT APPLIES TO:

MONONGALIA COUNTY
COMMISSION, et al.,

Plaintiffs,

v.

PURDUE PHARMA L.P.,

Defendants.

Civil Action Nos. 18-C-222 MSH
18-C-233 MSH
18-C-234 MSH
18-C-235 MSH
18-C-236 MSH

**ORDER DENYING DEFENDANTS JOHNSON & JOHNSON AND
JANSSEN PHARMACEUTICALS, INC.'S MOTION TO DISMISS
PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM**

Pending before the Court is *Defendants Johnson & Johnson and Janssen Pharmaceuticals, Inc.'s Motion to Dismiss Plaintiffs' Complaint for Failure to State a Claim* (Transaction No. 63550751), filed in *Monongalia County Commission, et al. v. Purdue Pharma L.P., et al.*, Civil Action Nos. 18-C-222 MSH and 18-C-233 MSH through 18-C-236 MSH (the *Monongalia County* cases), which has been fully briefed by the parties. The Court has reviewed the parties' briefing of the instant motion, as well as the Circuit Court of Marshall County's *Order Denying Johnson & Johnson and Janssen Pharmaceutical, Inc.'s Motion to Dismiss* filed in *Brooke County Commission, et al. v. Purdue Pharma L.P., et al.*, Civil Action Nos. 17-C-248 MSH through 17-C-255 MSH (the *Brooke County* cases). A copy of the Order is attached as Exhibit A.

In addition, the Court has reviewed *Plaintiffs' Motion for Entry of Orders Denying Defendants' Pending Motions to Dismiss* and proposed Orders (Transaction ID 64344046), Defendants' proposed *Order Denying Manufacturer Defendants' Respective Motions to Dismiss*

Plaintiffs' Complaint (Transaction ID 64346482), and Defendants' *Objection to Interlocutory Decision, Notice of Intent to Seek Extraordinary Writ, and Request for Findings of Fact and Conclusions of Law* (Transaction ID 64346834). Having conferred with one another to ensure uniformity of their decision, as contemplated by *Rule 26.07(a)* of the *West Virginia Trial Court Rules*, the Presiding Judges unanimously **DENY** Defendants *Johnson & Johnson and Janssen Pharmaceuticals, Inc.'s Motion to Dismiss Plaintiffs' Complaint for Failure to State a Claim* (Transaction No. 63550751) for the following reasons.

The claims asserted by Plaintiffs in the *Monongalia County* cases are identical to those asserted by the Plaintiffs in the *Brooke County* cases, which are companion Opioid Litigation cases now pending before the Mass Litigation Panel. Prior to referral of the Opioid Litigation to the Panel, both the *Brooke County* cases and the *Monongalia County* cases were pending before the Honorable David W. Hummel, Jr. in the Circuit Court of Marshall County, West Virginia. Defendants *Johnson & Johnson and Janssen Pharmaceutical, Inc.* filed a motion to dismiss the complaint in the *Brooke County* cases, asserting the same arguments and issues raised in the instant motion to dismiss. That motion was fully briefed and argued before Judge Hummel, who denied the motion in its entirety. See Exhibit A.

Thereafter, the Manufacturer Defendants filed a Petition for a Writ of Prohibition with the Supreme Court of Appeals of West Virginia concerning the Marshall County Circuit Court's denial of their motions to dismiss the Complaint in the *Brooke County* cases. The Petition was unanimously refused.

As previously held, Judge Hummel has entered numerous Orders denying motions to dismiss in the *Brooke County* cases which the Court finds are well-founded. Those Orders are the law of the case. The Court will not revisit Judge Hummel's rulings, to the extent the same parties who filed motions to dismiss in the *Brooke County* cases have filed identical motions to

dismiss in the *Monongalia County* cases. See *Order Regarding Rulings Issued During the September 20, 2019 Status Conference* (Transaction ID 64297517). Accordingly, the Court hereby adopts and incorporates by reference, as if fully set forth herein, the findings of fact and conclusions of law set forth in the Marshall County Circuit Court's *Order Denying Johnson & Johnson and Janssen Pharmaceutical, Inc.'s Motion to Dismiss* entered in the *Brooke County* cases. See Exhibit A.

To the extent Johnson & Johnson and Janssen Pharmaceutical, Inc. rely on decisions from other courts rendered after Judge Hummel denied their motion to dismiss the Complaint in the *Brooke County* cases, the Court is not persuaded. The new authority is from trial courts in other jurisdictions that have no precedential value.

Based upon the foregoing, it is accordingly **ORDERED** that *Defendants Johnson & Johnson and Janssen Pharmaceuticals, Inc.'s Motion to Dismiss Plaintiffs' Complaint for Failure to State a Claim* (Transaction No. 63550751) is **DENIED**.

It is further **ORDERED** that all exceptions and objections are noted and preserved.

A copy of this Order has been electronically served on all counsel of record this day via File & ServeXpress.

ENTERED: October 31, 2019.

/s/ Alan D. Moats
Lead Presiding Judge
Opioid Litigation

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IN THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA

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BROOKE COUNTY COMMISSION,
HANCOCK COUNTY COMMISSION,
HARRISON COUNTY COMMISSION, LEWIS
COUNTY COMMISSION, MARSHALL
COUNTY COMMISSION, OHIO COUNTY
COMMISSION, TYLER COUNTY
COMMISSION, and WETZEL COUNTY
COMMISSION,

Plaintiffs,

vs.

PURDUE PHARMA L.P.; PURDUE PHARMA
INC.; THE PURDUE FREDERICK COMPANY,
INC.; MARK RADCLIFFE; MARK ROSS;
PATTY CARNES; TEVA
PHARMACEUTICALS USA, INC.;
CEPHALON, INC.; JANSSEN
PHARMACEUTICALS, INC.; ORTHO-
MCNEIL-JANSSEN PHARMACEUTICALS,
INC. n/k/a Janssen Pharmaceuticals, Inc.; JANSSEN
PHARMACEUTICA, INC. n/k/a Janssen
Pharmaceuticals, Inc.; JOHNSON & JOHNSON;
ENDO HEALTH SOLUTIONS INC.; ENDO
PHARMACEUTICALS, INC.; ALLERGAN plc;
ACTAVIS plc; ACTAVIS, INC.; ACTAVIS
LLC; ACTAVIS PHARMA, INC.; WATSON
PHARMACEUTICALS, INC.; WATSON
PHARMA, INC.; WATSON LABORATORIES,
INC.; MCKESSON CORPORATION;
CARDINAL HEALTH, INC.;
AMERISOURCEBERGEN DRUG
CORPORATION; RITE AID OF MARYLAND,
INC.; KROGER LIMITED PARTNERSHIP II;
CVS INDIANA, L.L.C.; WAL-MART STORES
EAST, LP; GOODWIN DRUG COMPANY;
WEST VIRGINIA BOARD OF PHARMACY;
DAVID POTTERS; EDITA P. MILAN, M.D.;
TRESSIE MONTENE DUFFY, M.D.; EUGENIO
ALDEA MENEZ, M.D.; SCOTT JAMES
FEATHERS, D.P.M.; and AMY LYNN BEAVER,
P.A.-C,

Defendants.

Civil Action No. 17-C-248

The Honorable David W. Hummel, Jr.

ORDER DENYING JOHNSON & JOHNSON AND
JANSSEN PHARMACEUTICAL, INC.'S MOTION TO DISMISS

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Exhibit A

On November 7, 2018, Plaintiffs and Defendants Johnson & Johnson (“Johnson & Johnson”) and Janssen Pharmaceutical, Inc. (“Janssen”) (together, “J&J”) appeared for a hearing on J&J’s Motion to Dismiss. Having considered the pleadings, the parties’ arguments and authorities in support of as well in opposition to the instant motion, the applicable law, other materials filed by the parties, and the entire court record herein, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiffs filed their Complaint in the above Civil Action on December 13, 2017, asserting claims related to the manufacturing, marketing, sale, and/or distribution of opioids in the Plaintiff counties and in the areas surrounding the counties.

2. The Plaintiffs’ Complaint asserts the following causes of action against J&J: Public Nuisance (Count I, Compl. ¶¶ 673-90); Unjust Enrichment (Count II, *id.* ¶¶ 691-99); Fraud by Concealment (Count III, *id.* ¶¶ 700-02); Negligence and Negligent Marketing (Count IV, *id.* ¶¶ 703-14); and Fraud and Intentional Misrepresentation (Count V, *id.* ¶¶ 715-22). Plaintiffs’ Complaint also asserted causes of action for Strict Liability—Defective Design (Count VII, *id.* ¶¶ 745-49) and Strict Liability—Failure to Warn (Count VIII, *id.* ¶¶ 750-54) against the Manufacturer Defendants, but Plaintiffs’ subsequently withdrew Counts VII and VIII.

3. On April 24, 2018, J&J f filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure asserting that the above Counts of the Plaintiffs’ Complaint fail to state claims upon which relief can be granted under West Virginia law.

4. In its Motion, J&J argues that Plaintiffs’ claims should be dismissed for the following reasons: Johnson & Johnson is merely the parent company of Janssen and cannot be held liable for Janssen’s actions; Plaintiffs do not allege sufficient facts to attribute to J&J

misrepresentations ostensibly made by third parties; the labels on J&J's drugs shield it from liability; J&J's statements were not misleading.

5. Plaintiffs oppose J&J's arguments as follows: J&J exercised control over the development and marketing of opioids by Janssen; J&J sufficiently controlled third parties such that their misrepresentations can be imputed to J&J; FDA labels do not immunize pharmaceutical companies that have engaged in deception; and Plaintiffs sufficiently allege that J&J's marketing was misleading.

LEGAL STANDARD

6. A motion to dismiss for failure to state a claim "should be viewed with disfavor and rarely granted." *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W. Va. 603, 606, 245 S.E.2d 157, 159 (1978). "The purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the sufficiency of the complaint." *Cantley v. Lincoln Cty. Comm'n*, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007). To that end, a "trial court considering a motion to dismiss under Rule 12(b)(6) must liberally construe the complaint so as to do substantial justice." *Id.* See also W.Va. R. Civ. P. 8(f). The trial court's consideration begins, therefore, with the proposition that "[f]or purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true." *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978). The policy of Rule 8(f) is to decide cases upon their merits, and if the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied. *Id.* at 158-59.

A. Control Over Janssen and Third Parties

7. Plaintiffs allege that across the pharmaceutical industry “core message” development was funded and overseen on a national basis by corporate headquarters. (Compl., ¶ 133.) The Complaint explains that Defendants, including J&J, ensure marketing consistency nationwide through national and regional sales representative training; national training of local medical liaisons, the company employees who respond to physician inquiries; centralized speaker training; single sets of visual aids, speaker slide decks, and sales training materials; and nationally coordinated advertising. (*Id.* ¶ 134.)

8. Plaintiffs also allege that documents posted on J&J’s websites confirm J&J’s control of the development and marketing of opioids by Janssen. For example, the “Ethical Code for the Conduct of Research and Development” posted on the Janssen website is Johnson & Johnson’s company-wide Ethical Code, which it requires all subsidiaries to follow. In addition, all Janssen officers, directors, employees, and sales associates must certify that they have “read, understood and will abide by” the Code, which governs all forms of marketing at issue in this case. Consistent with these company-wide requirements, the Complaint expressly alleges that J&J controls the development and sale of Janssen’s drugs (*id.* ¶ 17); that J&J deals with the FDA regarding Janssen’s products (*id.*); and that the profits from Janssen’s drugs inure to the benefit of J&J (*id.*).

9. Accordingly, the Court finds and concludes that Plaintiffs adequately allege that J&J sufficiently controlled Janssen such that Janssen’s misrepresentations can be imputed to Johnson & Johnson.

10. The Court further finds and concludes that Plaintiffs have adequately pled concert of action and conspiracy as bases for J&J’s collective liability with Janssen. (*Id.* ¶¶ 147 & n.47,

629-32, 674, 716.) *See* W. Va. Code § 55-7-13c (“[J]oint liability may be imposed on two or more defendants who consciously conspire and deliberately pursue a common plan or design to commit a tortious act or omission”); *Dunn v. Rockwell*, 225 W. Va. 43, 57, 689 S.E.2d 255, 269 (2009) (“[A civil conspiracy] is . . . a legal doctrine under which liability for a tort may be imposed on people who did not actually commit a tort themselves but who shared a common plan for its commission with the actual perpetrator(s).”).

11. The Court further finds and concludes that Plaintiffs plead facts from which the trier of fact may infer that J&J had sufficient control or influence over third parties such that their statements may be attributed to Purdue. (*See* Compl. ¶¶ 137, 147-51.)

B. J&J’s Labels

12. In *City of Chicago v. Purdue Pharma L.P.*, No. 14-C-4361, 2015 WL 2208423, at *4 (N.D. Ill. May 8, 2015), a similar opioids case, the court found that FDA labels do not immunize pharmaceutical companies that have engaged in deception.

13. In this case, Plaintiffs have alleged that J&J engaged in a widespread deceptive marketing campaign involving opioids, which drastically increased the number of prescriptions written and dispensed and misled physicians, patients, and Plaintiffs. (Compl. ¶¶ 39-41, 36, 37, 598-99, 611-15, 617-20.)

14. Therefore, the Court finds and concludes that the labels on J&J’s drugs do not shield it from liability.

C. J&J’s Misrepresentations

15. In its Motion to Dismiss, J&J argues that the AGS Clinical Practice Guideline’s recommendation that “all patients with moderate to severe pain . . . should be considered for opioid therapy” is not misleading as a matter of law because it was accompanied by a statement that the

recommendation is based on a low quality of evidence. But, as Plaintiffs allege, that statement is followed by another statement that the recommendation is “strong.” Plaintiffs further allege that, when read in context, the “strong recommendation” that “all [older] patients with moderate to severe pain . . . should be considered for opioid therapy” is misleading because it suggests that, based on the available evidence, the risk-benefit profile of opioids supports their widespread use.

16. In its Motion to Dismiss, J&J also argues that statements in American Pain Federation’s *Exit Wounds* are not misleading as a matter of law. Plaintiffs allege that J&J sponsored the American Pain Federation’s *Exit Wounds*, a marketing effort that targeted veterans suffering from pain, which promoted the idea that long-term exposure to opioids very rarely leads to addiction in people who are not predisposed and omitted warnings about the potentially fatal interactions opioids can have when taken with other medications. (Compl., ¶¶ 230, 231, 233, 234, 241(q), 272(k), 476, 521-22.) J&J contends that the omission from *Exit Wounds* of the risk of potentially fatal interactions between opioids and other drugs is not misleading because, unlike branded material, the FDA does not require unbranded materials to include all of the potential side-effects. But the law is clear that just because a particular disclosure is not mandated by the FDA does not mean that its omission is not misleading as a matter of law. *See, e.g., Wyeth v. Levine*, 555 U.S. 555, 573-78 (2009) (FDA regulations are a “floor,” not a “ceiling,” with respect to warnings); *see also In re Testosterone Replacement Therapy Prods. Liab. Litig. Coordinated Pretrial Proceedings*, No. 14 C 1758, 2016 WL 861213, at *3 (N.D. Ill. Mar. 7, 2016) (plaintiffs entitled to pursue fraud claim based on marketing misrepresentations even where FDA did not require, and would not permit, disclosures to be made in the label).

17. In its Motion to Dismiss, J&J further argues that statements in J&J’s “patient education guide,” *Finding Relief*, are not misleading as a matter of law. Plaintiffs allege that

Finding Relief contains misrepresentations. (See Compl. ¶¶ 496-504.) These alleged misrepresentations include that patients will not become addicted to opioids that are prescribed by a doctor, that many studies conclude that opioids are rarely addictive, that it is a “myth” that opioids are addictive, and that it is similarly a “myth” that “opioid doses have to be bigger over time.” (*Id.*) Plaintiffs adequately allege that these representations are misleading, especially as compared to the presentation of risks of non-steroidal anti-inflammatory drugs (“NSAIDs”). (*Id.*) Specifically, Plaintiffs allege that patients frequently become addicted to opioids even when the opioids they are taking have been prescribed by a doctor (*id.* ¶¶ 67-76); that over time, patients develop tolerance and typically require progressively higher doses to obtain the same levels of pain reduction (*id.* ¶ 72); and that NSAIDs are in fact much safer than opioids (*id.* ¶¶ 102-03, 225, 270).

18. In its Motion to Dismiss, J&J claims that statements in *Let’s Talk Pain* are neither misleading nor relevant. Plaintiffs allege that *Let’s Talk Pain* was one of many places where J&J contributed to the misconception that the risks of addiction and abuse were insignificant, overblown, and a result of physicians’ “undertreatment of pain.” (*Id.* ¶ 252.) In *Let’s Talk Pain*, J&J allegedly misled physicians and patients to believe that addiction-related behavior was actually “pseudoaddiction,” which “refers to patient behaviors that may occur when pain is undertreated.” (*Id.* ¶ 260(e).) Plaintiffs also allege that *Let’s Talk Pain* “misrepresented that the use of opioids for the treatment of chronic pain would lead to patients regaining functionality.” (*Id.* ¶ 241(o-r).) Plaintiffs further allege that Defendants invented the concept of “pseudoaddiction” (*see, e.g., id.* ¶¶ 259-60); that any statement or suggestion that “the concept of ‘pseudoaddiction’ is substantiated by scientific evidence” is false (*id.* ¶ 260); and that “[t]here is no scientific evidence

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to support the concept of 'pseudoaddiction,' and any suggestion that addictive behavior masquerades as 'pseudoaddiction' is false" (*id.* ¶ 352).

JOSEPH M. RUCKI

19. Accepting Plaintiffs' allegations as true and construing the allegations in the light most favorable to Plaintiffs, the Court finds and concludes that Plaintiffs have sufficiently alleged the falsity of the misrepresentations at issue here. At the very least, whether J&J's marketing was misleading is an issue of fact. *See Beattie v. Skyline Corp.*, No. 3:12-2528, 2014 WL 7335148, at *6 (S.D.W. Va. Dec. 19, 2014) (whether an act is unfair or deceptive raises a question of fact).

ORDER

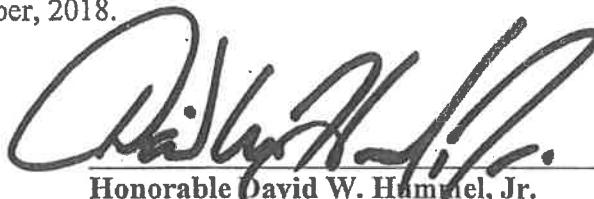
Based upon the foregoing Findings of Fact and Conclusions of Law, the Court, taking the allegations in the Complaint as true and construing the Complaint in the light most favorable to Plaintiffs, **FINDS** that Plaintiffs' Complaint sufficiently states claims for relief against the Defendants and the Defendants have not demonstrated beyond doubt that Plaintiffs can prove no set of facts in support of their claims (as it must do to succeed on a motion to dismiss). Accordingly, it is

ORDERED that Defendants' Motion to Dismiss is denied in its entirety.

It is further **ORDERED** that all exceptions and objections are noted and preserved.

It is further **ORDERED** that an attested copy of this Order shall be provided to all counsel of record.

ENTERED THIS 28th day of December, 2018.



Honorable David W. Hammett, Jr.
Judge of the Circuit Court
Marshall County, West Virginia

A Copy Teste:

Joseph M. Rucki, Clerk

By Danna Crow Deputy